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AUG
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____.

PARK PLACE, INCORPORATED,

Petitioner

-vs-

CITY OF CLEVELAND, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

John R. Vintilla,
112 Plaza West Building,
20220 Center Ridge Road,
Cleveland, Ohio 44116,

Counsel for Petitioner.

Francis X. Cook,
Of Counsel.

QUESTIONS PRESENTED

1. Where the nature of the facilities and the extent of the privileges made available to certain businesses at an airport owned and operated by a municipality are identical in every respect, may the city arbitrarily extract from a particular business an amount far in excess of the charge demanded of and received from other businesses similarly circumstanced?

2. Where a company using city-owned airport facilities was classified as a courtesy vehicle operator with other businesses having similar airport operations, and all were paying the same charge therefor, may the city thereafter single out the company and require it to pay for the continued use of the same facilities a charge far in excess of the amount being paid by the other courtesy vehicle operators, simply because a direct competitor in the same classification agreed to pay

a larger amount, although not required to do so by the city?

3. Where the amount a municipality demands from a business using its airport facilities in interstate commerce is induced and determined solely by a direct competitor without any independent basis for the charge, is the action of the city unreasonable, or arbitrary and discriminatory and, therefore, an undue burden on interstate commerce?

PARTIES TO PROCEEDING

The parties to this proceeding are contained in the caption of the case.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

PARK PLACE, INCORPORATED,

Petitioner,

vs.

CITY OF CLEVELAND, OHIO,

MARY VODICKA,

Director of Port Control,

Acting Commissioner of

Cleveland Hopkins International Airport,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, unreported, and the opinion rendered by the District Court for the Northern District of

Ohio, Eastern Division, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 25, 1982. A timely petition for rehearing en banc was denied on April 8, 1982, and this petition for certiorari was filed within the period extended by Justice O'Connor. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8 of the Constitution; the Fourteenth Amendment thereto; and the City of Cleveland, Ohio, Ordinance No. 1101-78 -- all appear in the Appendix hereto.

STATEMENT OF THE CASE

The petitioner instituted this action for a declaratory judgment and injunctive

relief to invalidate an ordinance of the City of Cleveland, Ohio, which arbitrarily discriminated against the petitioner in violation of the petitioner's federal constitutional rights and of the Commerce Clause.

Upon motions for a summary judgment submitted by the respective parties, the district court ruled in favor of the respondents and dismissed the complaint. The Court of Appeals affirmed the decision of the district court by means of an abrupt two-page order. The petition for a rehearing en banc addressed to the circuit court was denied.

Since July 1, 1977 the petitioner has operated a courtesy vehicle service, also known as a shuttle bus service, to and from Cleveland Hopkins International Airport, whereby it picks up and delivers airline passengers who park their automobiles at the petitioner's parking lot near the airport in Brook Park, Ohio. Pursuant to the Board of Control Resolution No. 039-78 of June 5, 1978,

the Respondent-City (hereinafter referred to as City) established a classification of all companies which furnished courtesy service to their customers to and from the airport. On June 6, 1978 the City sent the petitioner a letter, advising it, among other things, of the classification, and listing the companies therein, as follows:

1. Park 'N' Fly
2. Park Place (anticipated)
3. A-1 Rent-A-Car
4. Holiday Inn, Strongsville
5. Ramada Inn
6. Holiday Inn, Airport
7. Howard Johnson's
8. Sheraton Hopkins
9. Marriott
10. Travelodge
11. Hollenden House
12. Bond Court
13. Sheraton Airport
14. Bratenahl
15. Hospitality Inn
16. Port O' Call
17. Budget Inn
18. Dollar Inn

By virtue of the classification, the City assigned to the petitioner and others offering courtesy shuttle service, specific and equally non-exclusive areas at the airport

terminal to pick up and discharge their respective customers. A permit, as required, was secured by the petitioner from the City for the operation of its vehicles on airport property, for which petitioner, as well as the other courtesy vehicle operators, paid the City $250 every six months for each vehicle used as a shuttle bus.

On February 12, 1979 the City Council of Cleveland enacted an "Emergency" Ordinance, No. 1101-78, requiring the petitioner to enter into a two-year contract with the City and to pay the sum of "Ten Thousand Dollars ($10,000.00) or five per cent (5%) of all gross revenues per year, whichever is greater," for the continued right to operate its vehicles upon the airport. (See Appendix, Page 45.)

For approximately six months prior to the institution of this cause, and in order to compel the petitioner to pay the new charges, the petitioner was harassed and

threatened. Its employees were subjected to criminal proceedings which were ultimately resolved in favor of the employees. During this same period, the petitioner's permit to operate at the airport was revoked, and its sign at the airport removed, all of which compelled the petitioner to seek judicial relief to protect and preserve its rights during the pendency of the instant case. Following the issuance of a temporary restraining order, petitioner executed the contract required by the aforementioned Ordinance, reserving the right to challenge the constitutionality of the Ordinance and the validity of the payments made thereunder. The parties entered into the agreement in order to permit the petitioner to pursue the instant litigation without prejudice.

The abrupt and persistent demand by the City that the petitioner must pay 5% of its gross annual receipts for the continued use of the airport facilities, was caused by the

sudden and voluntary agreement of a direct and sole competitor of the petitioner and courtesy bus operator, Park 'N' Fly of Ohio, Inc., to pay 5% of its annual gross earnings for the continued privilege of operating its shuttle bus service on airport property. In a letter addressed to the Director of Port and Harbors, the chairman of Park 'N' Fly of Ohio, Inc., Mr. Martin J. Bloom, wrote among other things, as follows:

> This letter is in confirmation of our meeting last week with you and Mr. N.M. DeVito, City Attorney. Our understanding of the agreements reached at the meeting are as follows:
>
> 1) We will pay retroactive to July 1, 1975, the same courtesy vehicle fee that the other courtesy vehicle operators (hotels, motels, off-airport rent-a-car companies, etc.) have agreed to pay on the same retroactive basis. This fee of $250 per courtesy vehicle per six months amounts to $2000.00 for our eight vehicles for the period July 1 - December 31.
>
> 2) Effective January 1, 1976, we will implement our agreement

> to pay the Cleveland Hopkins International Airport 5% of our gross parking revenues in exchange for sign privileges and a non-exclusive waiting area at the terminal building for our courtesy vehicles . . ..

As a result of the so-called "Emergency" Ordinance, the petitioner alone was compelled to pay a charge for its airport operations far in excess of that which it had been paying, although the petitioner's privileges at the airport continued to be the same. The other courtesy vehicle operators - the hotels and motels - continued to pay only $250 per vehicle. The reason or basis for the abrupt change in petitioner's classification by the City of Cleveland was never documented officially. The petitioner was not consulted or given an opportunity to discuss or to be heard concerning the drastic and sudden change in the amount demanded by the City. Moreover, the City had not undertaken any surveys or official studies in the public interest to

substantiate and justify its action against the petitioner. Subsequent to the enactment of the challenged Ordinance, the petitioner's operations at the airport continued to be identical in every respect to those engaged in by the petitioner prior thereto.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with decisions of this Court, and violates the equal protection rights of the petitioner as secured by the Fourteenth Amendment.

The issue before the court involves the constitutional validity of a certain ordinance of the City of Cleveland. The precise question presented for decision is whether the action of the City - in singling out the petitioner and imposing a separate charge upon its airport operations, while exempting from such charge other businesses that were being provided similar services and facilities - is so arbitrary and discriminatory as

to fall within the constitutional prohibition of the Fourteenth Amendment.

In affirming the decision of the District Court in an two-page Order, the Sixth Circuit stated:

> . . .there was no showing that Ordinance No. 1101-78 either imposed an unreasonable burden upon interstate commerce or arbitrarily discriminated in favor of hotels and motels which had been excluded from the scope of that ordinance. . . .

We shall first direct our arguments to the finding of the District Court, ratified by the Circuit Court, that "there was no showing that the Ordinance . . .discriminated in favor of hotels and motels which had been excluded from the scope of that ordinance...."

The immutable evidence in the record reveals that the City had at an earlier time created a special classification of all businesses which use the airport facilities in connection with their operation of courtesy vehicles to shuttle customers to and from the

airport. The City had placed and considered the petitioner to be in the same category with the hotels and motels. Implicit in the listing of the petitioner in this category was the determination that the airport privileges awarded to the petitioner were substantially similar to those extended to the hotels and motels. The certitude of the City's determination in this respect is demonstrated by the evidence that the petitioner was permitted to operate in the same manner, and to pay the same charge therefor as the hotels and motels through the year 1978. Especially enlightening on this point is the finding of the District Judge, as follows:

> On February 8, 1978, the City of Cleveland adopted Resolution No. 038-78 which provided the Director of Port Control with authority to issue permits to operators of courtesy vehicles at the Airport for a term not to exceed six months at a fee of not less than $250 per vehicle. The Resolution also provided for the designation and restriction of the location of waiting and pick-up areas for such vehicles for the

> purpose of ameliorating traffic congestion at the Airport. Park Place was assigned two such waiting and pick-up areas and paid the required fees on at least two of the six vehicles it was operating. Various other businesses which provided courtesy shuttle service to the Airport, comprised principally of hotels and motels, were required to comply with the resolution as well. (underscoring ours)

It is important to remember that the nature and extent of the facilities and privileges which the City extended to the petitioner in 1979 and thereafter were identical to those which had been accorded the petitioner in the period immediately prior to the enactment of the challenged ordinance. As a result of the "Emergency" Ordinance of 1979, the petitioner was the only business in the courtesy vehicle classification which was compelled to pay a larger amount for the continued use of the identical facilities at the airport.

In light of the uncontroverted evidence, it is ironic that the lower courts have

agreed and concluded that the petitioner and the hotels and motels are in a separate classification with regard to the privileges and facilities accorded them, respectively, at the airport The serious error in this regard is that the record clearly shows that the City always considered and classified the petitioner as a courtesy vehicle operator along with hotels and motels. A further corroboration of this fact is to found in an ordinance proposed by the City to govern airport activities of various businesses which the City had submitted to the City Council of Cleveland for adoption. The proposal appears in the City Record, January 13, 1982. The relevant section of the proposed ordinance is Section 571.01(h). It reads:

> "Courtesy vehicle" means any motor vehicle, other than a bus, limousine or taxicab, which is regularly operated for transport of passengers and/or baggage without a charge separately stated to the passenger between the Airport and any motel, hotel, auto rental office, parking

> lot, or other commercial activity situated off-Airport. (underscoring ours)

Thus, we see that a "courtesy vehicle" is defined by the City as a motor vehicle which transports passengers and/or baggage without a charge separately stated between the particular business located on off-airport property and the Airport. The significant aspect of the language is that it specifically excludes a bus, limousine or taxicab because such businesses extract a charge for the transportation of a passenger and/or baggage to the Airport. The common denominator of the classification is the category of businesses that shuttle passengers to the Airport without a charge separately stated. And the City includes the petitioner and the hotels and motels in the same category.

A municipal ordinance is a State statute for purposes of federal jurisdiction, New Orleans v. Duke, 427 U.S. 297, 301 (1976).

The Equal Protection Clause of the federal constitution requires that the distinction drawn by the Ordinance in question must rationally promote a legitimate municipal interest, Dandridge v. Williams, 397 U.S. 471, 486-487. The police power of the City of Cleveland with regard to the operation of its airport must be exercised by means of ordinances that are equal and uniform in their application. The City may not arbitrarily discriminate between those to whom it extends equal privileges or facilities. A charge cannot be imposed upon a particular business while other businesses in the same class are exempt from a like charge. In the final analysis, the City must not foster invidious discrimination - that is, it must not discriminate unfairly among those businesses to whom it extends similar privileges on airport property.

The discrimination in our case between the petitioner and the hotels, motels, etc.,

with identical operations and privileges at the Cleveland Hopkins International Airport is palpably arbitrary. The guiding rule to be used in determining the constitutional validity of the Ordinance was enunciated by this Court in the case of F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). It reads, as follows:

> . . . The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

2. The decision of the Sixth Circuit raises a serious question concerning the appropriate criteria to be applied by the courts in determining the reasonableness of a municipality's charge for the use of airport facilities consistent with the equal protection provision of the Fourteenth Amendment.

The Sixth Circuit Court stated:

> It appeared to Judge Manos, from the evidence and from the stipulation of facts, that the services offered by the plaintiff Park Place were qualitatively and quantitatively different from those offered by other shuttle service operators.

The Court agreed with the finding of the District Judge that the evidence supported the conclusion that the services offered by the plaintiff Park Place were qualitatively and quantitatively different from those offered by the other shuttle service operators. The critical language in the finding is "that the services offered by the plaintiff Park Place were qualitatively and quantitatively different . . .." Let us examine the propriety of this conclusion.

It has been established that the petitioner engages in the same operations, insofar as the City is concerned, as the hotels and motels, namely, the transportation of its customers between the Airport and its business

located off-Airport without a charge separately stated for such service. In other words, the petitioner delivers its customers to and picks them up from the Airport without a separate charge just as the hotels, motels, and others do. Just how this service of the petitioner is "qualitatively and quantitatively" different from that offered by other courtesy bus operators in connection with their Airport operations is left unanswered.

The principal issue in this case involves the right of a municipality to charge a reasonable fee for the use of its airport facilities. The determination of a reasonable charge entails the specific consideration of the particular services and facilities which are provided at the Airport by the City of Cleveland to the petitioner vis-a-vis the specific services and facilities extended to other businesses similarly circumstanced. The evaluation and comparison of these services and facilities is crucial to the

determination of the proper charge which the City may demand. The nature of the difference or similarity in the services provided by a municipality has been referred to as "qualitative" and "quantitative." This is a concept which some courts have resorted to in determining the reasonableness of the classification.

The district and circuit courts have misapprehended the significance of the concept as it applies to the issue in the case. The ruling in this respect illustrates a serious misconception of the relevant criterion.

The critical consideration for the City in arriving at a reasonable charge is the determination of the nature and extent of a business's operations on Airport property. If the operations on Airport property of a business are similar to those of other businesses, and the services and facilities accorded by the City are substantially alike to

all such businesses, the charge demanded by the City must be identical in order for the charge to be constitutionally permissible. Indeed, the court's conclusion is a novel approach to the problem at hand.

3. The approval by the court below of an ad hoc levy by a municipality on a company using airport facilities in interstate commerce frustrates the scope and purpose of the Commerce Clause.

The discriminatory nature of the challenged Ordinance is fatal in another important aspect. The City of Cleveland is engaged in the operation of the Airport as a public service to facilitate air travel to and from the City in interstate and international commerce for the convenience and accommodation of its citizens and the public in general. One of the essential commercial activities in connection with the operation of the Airport is the shuttle bus services for air passengers

and airlines using the airport. The City has a concern and a specific duty to encourage and to promote the best services available at the most reasonable prices possible for those who use the airport facilities. This obligation cannot be properly fulfilled unless the City performs its airport functions in a fair and impartial manner regarding those who do business at the airport.

The petitioner, in pursuit of its lawful business, is in the performance of a personal right belonging to all airline customers who move in interstate and international commerce. The Ordinance in question has permitted a private entrepreneur, rather than a governmental body, to determine the charge which its competitor must pay in order to operate its business on airport property. The improper and unlawful conduct in this respect on the part of the City is, we believe, self-evident. The approval of such a practice by the court below enabled the City to ignore its lawful

responsibility of encouraging and promoting business ventures which are essential to airline passengers and important to the effective operation of the airport. The conduct objected to by the petitioner in effect permitted a business with established operations at the airport and in other cities to voluntarily offer to pay an unreasonable amount for the privilege of airport operations in order to require a new competitor to pay a similar exorbitant amount. The competitor, being a novice in the business and insecure in the profitable operation at such an early stage, found the charge devastating.

The twofold inquiry in this regard is, (1) whether petitioner is engaged in interstate commerce, and, if so, (2) whether the Ordinance is a regulation which exceeds the City's legitimate authority. That the petitioner's airport operations affect commerce is established by the very nature of the operations. It is undisputed that the City

is entitled to a reasonable charge or fee for the use of the facilities provided at the airport. The issue is one of determining what is a reasonable charge and how that charge was determined. However, to recognize the City's authority regarding the regulation of commercial operations at the airport is not to concede that the City may exercise the authority arbitrarily and without regard to its effect on interstate commerce. The regulation or ordinance may be facially consistent but nonetheless discriminatory in its application and, therefore, in conflict with interstate commerce. Admittedly, the regulation of interstate commerce by the states is not invalid so long as there is a real relation to the suitable protection of the people of the state and so long as the regulation is reasonable in its requirements. Savage v. Jones, 225 U.S. 501 (1912).

The petitioner's services as a shuttle bus operator of airport passengers to and from

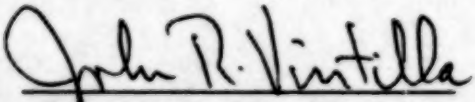
the airport, and its place of business in Brook Park, Ohio, are an integral part of the interstate package. The City may not directly burden or obstruct interstate commerce. Atchison, Topeka & Santa Fe Ry. Co. v. City of Chicago, 240 F.2d 930, 936 (7th Cir., 1967). The principle that "a State may enact local laws under its police power in the interest of the welfare of the people, although they affect interstate commerce" until the area of regulation is preempted by Congress, is not applicable where the State or local government "passes beyond the exercise of its legitimate authority, and undertakes to regulate interstate commerce by placing burdens upon it." First Nat. Ben. Soc. v. Garrison, 58 F. Supp. 972, 984. The City has no greater authority or control over the petitioner than to "incidentally and indirectly affect it by a bona fide, legitimate and reasonable exercise of its police power" to the interest of public safety, and the free

flow of traffic (underscoring added), supra, 240 F.2d at 936-938. If there is a real relation to the protection of health, welfare or safety of the people, and if the regulation or ordinance is reasonable in its requirement and classifications, then the measure imposed by the City is a legitimate exercise of its power. However, if the ordinance in no way enhances the public safety or convenience, or if its purpose is unreasonable or arbitrarily discriminatory, the measure unduly burdens interstate commerce. This, we believe, is the true nature of the ordinance being contested in this action.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and order of the Sixth Circuit.

Respectfully submitted,



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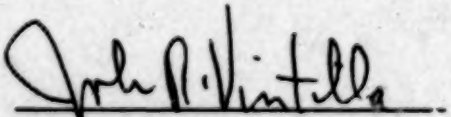
CERTIFICATE OF SERVICE

I hereby certify that on the day of August, 1982, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to James E. Young, Esquire, Director of Law, City of Cleveland, Room 106 - City Hall, Cleveland, Ohio 44114, Counsel for the Respondents. I further certify that all parties required to be served have been served.



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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

PARK PLACE, INC.,	)	CASE NO. C79-1251
Plaintiff,	)	
	)	Judge John M. Manos
v.	)	
CITY OF CLEVELAND,	)	MEMORANDUM OF OPINION
et al.,	)	
Defendants.	)	

On June 22, 1979 the plaintiff, Park Place, Inc., filed the above-captioned case seeking declaratory and injunctive relief against defendants, City of Cleveland and Mary Vodicka, Director of Port Control and Acting Airport Commissioner, alleging that the plaintiff was compelled to pay an unreasonable and discriminatory charge for the right to provide courtesy shuttle bus service to transport the plaintiff's parking lot customers to and from the Cleveland Hopkins

International Airport (hereinafter, Airport) and the plaintiff's parking lot.

On August 11, 1980 the plaintiff filed a motion for summary judgment to which affidavits were attached pursuant to Fed. R. Civ. P. 56, in which the following facts were set forth:

Park Place is an owner-operator of parking lot facilities located within one mile of the airport complex. Customers of Park Place park their cars and are provided shuttle bus service, without a separate charge in addition to the parking fee, to and from the airport terminal buildings. The cost and expense of providing the shuttle service is an overhead expense of Park Place.

On February 8, 1978 the City of Cleveland adopted Resolution No. 039-78 which provided the Director of Port Control with authority to issue permits to operators of courtesy vehicles at the Airport for a term not to exceed six months at a fee of not less than

$250 per vehicle. The Resolution also provided for the designation and restriction of the location of waiting and pick-up areas for such vehicles for the purpose of ameliorating traffic congestion at the Airport. Park Place was assigned two such waiting and pick-up areas and paid the required fees on at least two of the six vehicles it was operating. Various other businesses which provided courtesy shuttle service to the Airport, comprised principally of motels and hotels, were required to comply with the resolution as well.

On February 12, 1979 the City of Cleveland enacted Ordinance No. 1101-78 which provided the Director of Port Control with authority to enter into an agreement with Park Place for a period not to exceed two years for the furnishing of courtesy vehicles to and from the Airport and the Park Place parking facilities. The annual fee to be paid the city for the rights granted under

the contract was set at $10,000 or 5% of the gross revenues of Park Place whichever proved greater. Although a direct competitor of Park Place was required to enter into a similar agreement, the hotels and motels which offered courtesy shuttle bus services continued to operate under Resolution No. 039-78.

As a protective measure, Park Place entered into the above agreement reserving the right to challenge the validity of any payments made thereunder. Pursuant to such reservation Park Place commenced the instant suit.

In its motion for summary judgment Park Place contended that Ordinance No. 1101-78: (1) imposed an unreasonable burden on interstate commerce; and (2) arbitrarily discriminated in favor of hotels and motels which had been excluded from the scope of the Ordinance and were, therefore, permitted to operate shuttle services under Resolution No. 039-78.

In an opinion issued on September 17, 1980 this court denied the plaintiff's motion for summary judgment and held as a matter of law that the charge imposed on Park Place by Ordinance No. 1108-78 was a reasonable levy and did not constitute an impermissible burden on interstate commerce. Since no evidence had been presented at that date as to whether Ordinance No. 1101-78 arbitrarily discriminated in favor of hotels and motels because such businesses had been excluded from the scope of the Ordinance, this court also held that the issue of whether the Ordinance constituted a denial of equal protection presented a genuine issue of material fact which precluded granting plaintiff's motion for summary judgment.

The case is now before this court on the defendants' motion for summary judgment. For the reasons which follow the defendants' motion is granted.

On November 6, 1980 the parties to this action filed a stipulation of facts setting forth the operations of all other shuttle transportation operators currently authorized to use the facilities of the Airport. This stipulation of facts clearly establishes that the services offered by Park Place are qualitatively and quantitatively different from those offered by other shuttle service operators and, therefore, entitles the defendant to summary judgment on the equal protection claim raised by Park Place.

The stipulation of facts establishes that Park Place transports its parking lot customers to and from the Airport as a function of its business which sole purpose is provision of off-Airport auto parking and transportation to the Airport for Airport patrons. In return for the fee paid pursuant to Ordinance No. 1101-78, which is also paid without objection by Park'N Fly of Ohio, Inc., a direct competitor of Park Place, Park Place

receives the right to the nonexclusive use of two waiting areas, identified by either signs or stanchions which it supplies, and is permitted to operate two courtesy telephones in the Airport terminal.

Regarding other shuttle operators,[1] the stipulation of facts shows that none are given any designated waiting areas nor are they given the privilege of telephone service in the Airport terminal. Some of these services are permitted to post signs and a few are allowed telephone service in the Airport baggage area.[2] None of these courtesy vehicle services, however, other than Park'N Fly, receives the same combination of privileges as Park Place.

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1 Falling into this classification are: (1) shuttle service vehicles owned and operated by motels and hotels; (2) services operated by automobile rental agencies; (3) limousine services; and (4) taxicab services. None of these businesses offer services comparable to those of Park Place.

2 The following firms currently operate courtesy vehicle service at the Airport and are allowed the privileges listed:

1. Howard Johnson Lakefront Motor Lodge - no sign, phone in baggage area;

The court in Toye Bros. Yellow Cab Co. v. Irby, 305 F.Supp. 911 (E.D.La. 1969), affirmed 437 F.2d 806 (3d Cir. 1971) was presented with an equal protective challenge to an ordinance which regulated the use of airport facilities by courtesy shuttle service operators

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2 (cont'd.)

2. Thomas Limousine - no sign, no phone;
3. Thrifty Rent-A-Car - no sign, no phone;
4. A & D Limo Service - 2 signs, no phone;
5. Township Cab Co., Inc. - no sign, no phone;
6. Sheraton Airport Inn - 2 signs, phone in baggage area;
7. Vancouver Enterprises, Inc. - no sign, no phone;
8. Holiday Inn Cleveland Airport - 2 signs, phone in baggage area;
9. Harley Hotels - 1 sign, phone in baggage area;
10. Ramada Inns Cleveland Airport - 2 signs, phone in baggage area;
11. Marriott Inn - 2 signs, phone in baggage area;
12. Liberty Limo & Car Rental, Inc. - 1 sign, no phone;
13. Travel Lodge - no sign, phone in baggage area;
14. Holiday Inn (Strongsville) - 1 sign, phone in baggage area;
15. B & A Associates, Limited - 1 sign, phone in baggage area;
16. Airport Hilton Inn - 2 signs, phone in baggage area;
17. Dollar Inn - 1 sign, phone in baggage area;
18. American International Rent-A-Car - 2 signs, no phone;
19. Hopkins Airport Limo Service (pays permit fees and separately rents space) - 5 signs, phone in office;
20. Howard Johnson's Airport West Motor Lodge - 1 sign, phone in baggage area.

which is nearly identical to the challenge raised by Park Place in the instant case. The ordinance at issue in Toye was claimed to deny equal protection to courtesy shuttle service operators, which offered services comparable to those provided by Park Place, because they were required to pay a higher fee for the use of airport facilities than that imposed on the courtesy transportation services maintained by motels and hotels. The court found that the hotels and motels dispatched vehicles to the airport for the purpose of picking up and delivering incoming and departing guests. Consequently, this purpose limited the potential volume of business to be done by hotel and motel shuttle transportation services. Accordingly, the court held that rational grounds existed for the discrimination in fees imposed by the ordinance and this finding was undisturbed on appeal.

The rationale of the Toye decision is applicable to the instant case. Other than

Park'N Fly, no other courtesy transportation service operating at the Airport provides services similar to those provided by Park Place. Consequently, this court holds that rational grounds exist for the discrimination in fees imposed by Ordinance No. 1101-78 and that the defendants are entitled to summary judgment on the equal protection allegations of Park Place.[3]

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3 In the previous opinion issued in the above-captioned case this court held that although the equal protection claim of Park Place presented a genuine issue of material fact precluding summary judgment, the case of Park'N Fly of Texas, Inc. v. City of Houston, 327 F.Supp. 910 (S.D. Tex. 1971), raised a distinguishable claim and was not dispositive of of the allegations of Park Place. This court incorporates the pertinent portions of that holding in the decision reached today:

> In support of its contention that Ordinance No. 1101-78 arbitrarily discriminates in favor of motel and hotel shuttle bus service operations Park Place relies on Park'N Fly of Texas, Inc. v. City of Houston, 327 F.Supp. 910 (S.D. Tex. 1971), which held unconstitutional a city ordinance which prohibited parking lot companies and car rental agencies, which provided transportation between their facilities and the Houston Municipal Airport, from using favorable locations to pick-up and deliver passengers while providing full use of these positions to the city's parking concessionaire.

The defendant city has raised a permissive counterclaim pursuant to Fed. R. Civ. P. 13(b) regarding the failure of Park Place to pay certain per vehicle charges which it was required to pay during the period it was subject to Resolution No. 039-78. The city also claims fraud. Considerations of judicial economy and fairness to the parties, as well as the fact that the counterclaim presents questions predominantly of state law, requires this court to dismiss the

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3 (cont'd.)

Specifically, the ordinance was held to deny equal protection due to the city's parking concessionaire being authorized to deposit passengers at a more favorable location than permitted parking lot companies and car rental agencies.

Ordinance No. 1101-78, however, is clearly distinguishable from the ordinance at issue in Park'N Fly. It does not deny Park Place access to any favored positions at the Airport, nor does it reserve such a location to a parking concession operated by the city. Indeed, the Ordinance was designed so that Park Place could be assigned a favored position at the Airport, in return, of course, for the payment of a fee. Thus, Park'N Fly does not control the determination of the discrimination claim of Park Place.

counterclaim without prejudice pursuant to Fed. R. Civ. P. 42, See: United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130 (1966).

Fed. R. Civ. P. 56(c) provides that a motion for summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Smith v. Hudson, 600 F.2d 60 (6th Cir.), cert. denied 444 U.S. 996, 100 S. Ct. 495 (1979); Bryant v. Commonwealth of Kentucky, 490 F.2d 1273 (6th Cir. 1974); Daily Press Inc. v. United Press Int'l., 412 F.2d 126 (6th Cir.), cert. denied 396 U.S. 990, 90 S.Ct. 480 (1969).

Accordingly, the defendants' motion for summary judgment is granted and their counterclaim is dismissed without prejudice.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

81-3029

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PARK PLACE, INCORPORATED,
Plaintiff-Appellant

v. ORDER

CITY OF CLEVELAND; CITY HALL, MARY VODICKA, Director of Port Control, Acting Commissioner of Cleveland Hopkins International Airport,

Defendants-Appellees

/

Before: ENGEL, Circuit Judge; WEICK, Senior Circuit Judge, and COHN, District Judge*

The essence of plaintiff's complaint in the district court invoking the federal question subject matter jurisdiction of the court under 28 U.S.C. § 1331 and alleging a violation of Article 1, Section 8 of the Constitution and of the Fourteenth Amendment was that the defendant City of Cleveland, in the operation of the Cleveland Hopkins International

*Hon. Avern Cohn, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

Airport, had violated the plaintiff's rights to due process and equal protection by unlawfully and coercively extracting from the plaintiff as a condition of doing business, a contract for providing shuttle bus service between plaintiff's nearby parking lot and the airport facility at a rate which it claimed was grossly and arbitrarily greater than the fees charged others for the same and comparable services.

In an opinion filed in the district court on December 16, 1980, United States District Judge John M. Manos directed entry of summary judgment in favor of the defendants of the basis that upon the undisputed and material evidence before him, there was no showing that Ordinance No. 1101-78 either imposed an unreasonable burden upon interstate commerce or arbitrarily discriminated in favor of hotels and motels which had been excluded from the scope of that ordinance and which were, therefore, permitted to operate

their shuttle services under a separate resolution adopted by the City of Cleveland. It appeared to Judge Manos, from the evidence and from the stipulation of facts, that the services offered by plaintiff Park Place were qualitatively and quantitatively different from those offered by other shuttle service operators and, therefore, entitled the defendant to summary judgment on the equal protection claim raised by Park Place. It further appeared that the fee charged was the same as that which was paid by another parking lot operator, Park'N Fly of Ohio, Inc., a direct competitor with similar services. For these reasons and for the other reasons set forth by Judge Manos in his opinion,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

81-3029

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PARK PLACE, INCORPORATED,

Plaintiff-Appellant,

v. ORDER

CITY OF CLEVELAND: CITY HALL: MARY VODICKA, Director of Port of Control Acting Airport Commissioner of Cleveland Hopkins International Airport,

Defendants-Appellees.

_____/

Before: ENGEL, Circuit Judge, WEICK, Senior Circuit Judge, and COHN, District Judge*

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the plaintiffs-appellants has been referred to the panel which heard the original appeal. Upon

*Hon. Avern Cohn, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

Ord. No. 1101-78

An emergency ordinance authorizing and directing the Director of Port Control to enter into an agreement with Park Place, Inc., to provide a parking facility near Cleveland Hopkins International Airport including the use of courtesy vehicles, for the Division of Airports, Department of Port Control.

Whereas, in furtherance of the public purpose of promoting and aiding air navigation and commerce at Cleveland Hopkins International Airport, the City is desirous of providing for adequate and convenient parking facilities for its patrons; and

Whereas, Park Place, Inc., operates a parking lot near Cleveland Hopkins International Airport for the convenience of its customers; and

Whereas, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department; now, therefore,

Be it ordained by the Council of the City of Cleveland:

Section 1. That any provisions of the Charter and Ordinances to the contrary notwithstanding, the Director of Port Control, with the approval of the Board of Control, be and he hereby is authorized and directed to enter into an agreement with Park Place, Inc. for a period not to exceed two (2) years for the furnishing of courtesy vehicles for air passengers and other users of Cleveland Hopkins International Airport. The fee to be paid to the City by Park Place, Inc., for the rights granted shall be Ten Thousand Dollars ($10,000.00), or five percent (5%) of all gross revenues per year, whichever is greater.

THE CONSTITUTION OF THE UNITED STATES

ARTICLE I, Section 8, [1]. The Congress shall have Power . . .

[3] To regulate Commerce with foreign Nations, and among the several States. . . .

AMENDMENT XIV

Section 1. . . .

No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Office - Supreme Court, U.S.
FILED
SEP 8 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982
No. 82-255

PARK PLACE, INCORPORATED,
Petitioner
-vs-
CITY OF CLEVELAND, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

RESPONDENTS BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENTS
CITY OF CLEVELAND, et al.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982
NO. 82-255

PARK PLACE, INCORPORATED,

Petitioner

-vs-

CITY OF CLEVELAND, OHIO,

MARY VODICKA,

Director of Port Control,
Acting Commissioner of
Cleveland Hopkins International Airport,

Respondents

RESPONDENTS BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

QUESTION PRESENTED

Whether the court below correctly held that the City of Cleveland could constitutionally charge Park Place, Inc.,

a higher permit fee than other businesses which make less use of and have fewer privileges in their use of City airport facilities?

STATEMENT OF THE CASE

Petitioner Park Place, Inc. ("Park Place") is in the business of providing an off airport parking site for Cleveland, Ohio's, city airport. As is necessary to the operation of such a business, Park Place employs a fleet of shuttle buses to make frequent and continuous passenger trips between the airport and Park Place's parking facility. In addition to its heavy use of airport facilities, Park Place also has greater parking and phone privileges than do hotels,

motels, and cab companies that provide less frequent and casual airport service.

For this greater use and additional privileges, the Respondent City of Cleveland (Cleveland), by ordinance, charged Park Place a higher permit fee than was charged the more casual users.

Park Place objected to the higher fee.

On stipulated facts the trial court entered summary judgment for Cleveland. The Court of Appeals for the Sixth Circuit agreed that this higher permit fee was constitutionally permissible.

REASONS FOR DENYING THE WRIT

All judges who have reviewed the stipulated facts in this case have unanimously concluded there is no denial

of equal protection or violation of the Commerce Clause. These judges are correct. New Orleans v. Duke, 427 U.S. 297 (1976); Toye Bros. Yellow Cab Co. v. Irby, 305 F. Supp. 911 (E.D. La. 1969), aff'd 437 F. 2d 806 (5th Cir. 1971).

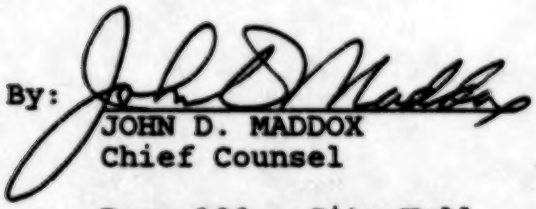
The constitutional principles of business regulation arising in this case were settled long ago and were correctly applied by the courts below.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES E. YOUNG
Director of Law

By: 
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